United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 774

Case No. 824: STEPCZYŃSKI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, at the request of Stefan Leon Stepczyński, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1994 the time-limit for the filing of an application with the Tribunal;

Whereas, on 17 November 1994, the Applicant, after making the necessary corrections, again filed an application in which he made the following requests:

"[To order the production of a number of documents]

and

(a) In order to restore my professional reputation and my honourable character, which were seriously called into question as a result of a conflict for which I bear no responsibility, that I be sent a letter signed personally by the Secretary-General, acknowledging the injuries that I have sustained and

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expressing regret that my career, which has been exemplary in terms of the requirements of the Charter of the United Nations, was ruined towards the end, without reasonable cause; and

(b) that I be paid damages for the injuries that I sustained during my active service and after my separation from service, as well as compensation for loss of income, a sum which, in the opinion of the Panel, should not be less than US$ 25,000, and that payment of appropriate interest be made in order to take into account the delay that has occurred - for which I am not responsible."

Whereas the Respondent filed his answer on 30 June 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Organization at Geneva (UNOG) on 1 July 1949. He was employed in the General Services Division until 1 November 1951, the date on which he was transferred to the secretariat of the Economic Commission for Europe. In April 1953, the Applicant was recruited as an assistant statistician in the Permanent Central Opium Board of the Drug Supervisory Body (predecessor of the International Narcotics Control Board (INCB)). In February 1958, he was promoted to the P-1 level and, in December 1967, was appointed Deputy Secretary of INCB, a post which he held for 10 years at the P-5 level, beginning in April 1972.

In January 1976, shortly before the retirement of the Secretary of INCB, the members of the Board unanimously decided that the Applicant should exercise, on a temporary basis, all the responsibilities of Secretary beginning on 1 August 1976, in anticipation of the Secretary's retirement. The Secretary, who had requested an extension of one year beyond the mandatory age of retirement, did not officially retire until 31 January 1977.

In a letter dated 20 February 1976, the President of INCB recommended that the Applicant be promoted to the D-1 level, since the Applicant would de facto assume his duties as Secretary on 1 August 1976. On 31 May 1976, the President of INCB again wrote to the Under-Secretary-General for Administration and Management:

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"... I would be very grateful if you could inform me whether a D-1 post could be temporarily placed at the disposition of the secretariat of the Board in order that [the Applicant] could be promoted to this grade on 1 August."

However, the Applicant's name was not included in the D-1 promotion register for 1976. The Applicant filed an appeal to the Appointment and Promotion Board on 6 August 1976, but without success.

On 13 May 1976, the Secretary-General, on the unanimous recommendation of INCB, decided to appoint the Applicant to succeed the Secretary of INCB, effective 1 February 1977. His appointment was officially announced in an administrative circular issued at Geneva on 24 January 1977.

The D-1 Promotion Register for 1977 was issued on 18 October 1978. It did not contain the Applicant's name.

On 18 February 1977, the President of INCB reiterated his recommendation that the Applicant be appointed to the D-1 level.

On 14 November 1977, the Applicant filed an appeal to the Appointment and Promotion Board, requesting the Board to reconsider his recommendation and include his name in the promotion register. The Applicant's appeal was rejected.

On 28 January 1978, the Applicant requested the Secretary-General to review the administrative decision not to promote him to the D-1 level.

On 8 March 1978, as part of a general review for the year 1978, the new Director-General of UNOG, after indicating that the only available D-1 post at UNOG was the one held by the Applicant at the P-5 level, stated in a memorandum to the Assistant Secretary-General for Human Resources Management:

"You will recall that [the Applicant] was recommended for promotion last year. Since, however, that recommendation was not endorsed by the APB, and in view of [the Applicant's] probable retirement in 1978, I do not feel that I can submit a recommendation for promotion at this time."

On 31 August 1978, the Applicant having reached the mandatory age of retirement, left the Organization.

On 16 March and 31 August 1978, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Geneva, against the administrative decisions that had denied him: (i) his promotion to the D-1 level (or, failing that, the appropriate special post allowance (SPA)) and (ii) the extension of his contract beyond the mandatory age of retirement.

The JAB agreed to combine the two appeals and issued a report on 14 August 1986.

Concerning the non-promotion of the Applicant, the JAB questions the procedure followed by the Appointment and Promotion Board:

> "... in view of the fact that the [Appointment and Promotion] Board reviewed the Applicant's case in the absence of any recent official evaluation of his professional performance, contrary to the requirements of existing procedure;
>
> [and] considers that, on the contrary, the evidence gives the strong impression that the procedures of the Appointment and Promotion Board may have been intentionally influenced by prejudice or extraneous factors, a point on which evidence has not been clearly established by the Panel owing to the Board's refusal to transmit the relevant documents, which has given rise to a doubt from which the Applicant should rightfully benefit." (*idem*)

Concerning the non-promotion of the Applicant beyond retirement age, the JAB considers:

> "the intent to deny the Applicant an extension beyond the age limit, even though at the time there were no restrictions in that regard, was not based on objective and justifiable reasons but was the result of intrigue and blatant favouritism, and was even a means of punishing the Applicant by making his promotion impossible ..."

The Board's conclusions and recommendations read as follows:

"*Conclusions*

347. ...

- Whereas the administrative decisions that are the subject of the present appeals, or the actions that directly resulted in such decisions, were, in the opinion of the Panel, heavily influenced, if not motivated, by the deliberate creation and maintenance of a climate unfavourable to the Applicant and, in particular, the maintenance of a confused and ambiguous situation, and the spreading of slanderous rumours concerning his professional conduct;

- Whereas this unfavourable climate had its origin in a dispute concerning the appointment of the Deputy Secretary of INCB, owing to the Applicant's refusal, in accordance with the provisions of the Charter, to submit to pressure exerted on him at the instigation of persons external to the United Nations Secretariat, and the Applicant therefore cannot be blamed for starting the dispute;

- Whereas, consequently, the appointment by the Secretary-General of the United Nations, at the Respondent's proposal, of the Deputy Secretary of INCB, was not tainted by any irregularity;

- Whereas the Respondent kept his superiors, in particular the Under-Secretary-General for Administration and Management and the Director-General of the United Nations at Geneva, as well as the Chief of Administration at Geneva and his principal assistants, informed of the pressure that was being exerted on him, without any of them taking any steps to halt such pressure or ensure normal working conditions for the Applicant;

The Panel concludes that no professional misconduct was committed by the Applicant in the performance of his duties,

- Whereas, in addition, no valid reason can justify the Appointment and Promotion Board's persistent refusal to recommend that the Secretary-General promote the Applicant in the absence of any recent official evaluation of his professional performance, contrary to the requirements of existing procedure;

- Whereas, on the contrary, the evidence gives the strong impression that the procedures of the Appointment and Promotion Board may have been intentionally influenced by prejudice or extraneous factors, a point on which evidence has not been clearly established by the Panel owing to the Board's refusal to transmit the relevant

documents, which has given rise to a doubt from which the Applicant should rightfully benefit;

- Whereas the unfavourable climate for the Applicant was created, increased and maintained, to the detriment of his excellent reputation, for personal reasons of resentment and favouritism, with full knowledge of the moral and material injuries that would ensue for the Applicant, and without any concern for the consequences this would inevitably have for the smooth functioning of INCB;

- Whereas the intent to deny the Applicant an extension beyond the age limit, even though at the time there were no restrictions in that regard, was not based on objective and justifiable reasons but was the result of intrigue and blatant favouritism, and was even a means of punishing the Applicant by making his promotion impossible;

The Panel concludes that

the Applicant's career would have followed its normal course until, and probably beyond, retirement age, with all the benefits that would have ensued for the Applicant and the Organization, if it had not been intentionally ruined by resentment and a spirit of vengeance, in a climate of gross incompetence on the part of the Administration. Thus, *the Panel considers* that there is responsibility on the part of the Secretary-General, although shared with the President [of INCB] and certain members of INCB, with respect to the undeniable damage suffered by the Applicant and, consequently, *the Panel deems* that it must recommend that the Secretary-General award appropriate relief to the Applicant. Considering that the Applicant has not claimed any material monetary compensation for damages, the Panel is of the opinion that the amount of such relief should be determined *ex aequo et bono*. Moreover, the Applicant's conduct throughout the events demonstrated that material interests were only of secondary importance to him and did not override his legitimate concern for fairness. Nevertheless, having noted that the Applicant suffered considerable moral and material injuries, *the Panel considers*, consequently, that it must recommend that the Secretary-General award the Applicant monetary compensation. The Applicant filed his two appeals in 1978, when it was still possible to promote him and to extend his service beyond the age limit, which is no longer possible at the present time ...

Recommendation

348. In the circumstances, the Panel recommends that the Secretary-General:

(a) In order to restore the Applicant's professional reputation and personal honourable character, which were seriously called into question as a result of a conflict for which he bears no responsibility, send him a letter with his personal signature, acknowledging the injuries he has sustained and expressing regret that his career, which has been exemplary in terms of the requirements of the Charter of the United Nations, was ruined towards the end, without reasonable cause; and

(b) pay the Applicant damages for the injuries he sustained during his active service and after his separation from service, as well as compensation for loss of income and costs incurred, a sum which, in the opinion of the Panel, should not be less than US$ 25,000, and take into account the intervening delay, for which the Applicant is not responsible, by paying appropriate interest ...

..."

In a letter dated 21 July 1989, the Applicant requested the acting Under-Secretary-General for Administration and Management to inform him of the decision concerning his appeal, since he had been notified that "the Joint Appeals Board had apparently submitted its reports on my cases in August 1986". In his reply, dated 4 August 1989, the Deputy Director of the Office of the Under-Secretary-General, stated:

"... Owing to absence of key personnel previously involved in handling your case I regret, given the length of time you have already waited, to have to inform you that we will look into the matter as soon as possible and be in touch with you again."

On 22 July 1993, the Applicant again wrote to the Under-Secretary-General for Administration and Management requesting his assistance in ensuring that the Secretary-General's decision concerning his case was transmitted to him without delay, since he had been waiting for it "for the past 16 years, despite many recommendations, many of which have gone unanswered".

On 28 September 1993, the Under-Secretary-General for Administration and Management replied to the Applicant in the following terms:

"I received your letter dated 22 July 1993 regarding your appeal to the Geneva Joint Appeals Board dating back to 1978. The Board had made in 1987 a recommendation to the Secretary-General, and the Secretary-General had rejected the recommendation of the Board on grounds that the delay in the proceedings of the JAB was due to the complexity of the case, and that you did neither suffer from violation of the terms of your appointment nor from non-observance of the UN Regulations and Rules. It is regrettable, however, that the report and the decision of the Secretary-General were not conveyed to you on time.

Herewith, please find the report of the Geneva Joint Appeals Board which the Secretary-General had rejected, deciding to maintain the contested decision.

In view of the prolonged appeal proceedings and the delay in the conveyance of the decision, the Secretary-General is prepared to consider reimbursing you for costs that you may have incurred in respect of the appeal. He would first need to receive from you a list of these costs. A final settlement would include the agreement that you would not litigate this case any further.

In case no settlement is undertaken, or agreed upon, the above-mentioned decision of the Secretary-General is 'the final decision on the appeal' mentioned by staff rule 111.2 (o). Therefore, any further recourse you might wish to file should be addressed to the Administrative Tribunal."

On 17 November 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The temporary exercise of the duties of Secretary of INCB, which began in August 1976, entitled him to an appropriate SPA, from the beginning of the seventh month of service, in accordance with staff rule 103.11.

2. The Applicant was entitled to promotion to the D-1 level in keeping with the principle according to which a promotion is the normal way of recognizing increased responsibilities and proven aptitude.

3. The Secretary-General was under an obligation to consult INCB concerning the extension of the Applicant's contract beyond retirement age.

Whereas the Respondent's principal contentions are:

1. The decision not to promote the Applicant was taken by the Respondent in the exercise of his discretionary power to appoint staff members to specific posts or to reject such appointments.

2. The decision not to extend the Applicant's contract beyond retirement age was taken by the Respondent in the regular exercise of his discretionary power arising from staff regulation 9.5.

The Tribunal, having deliberated from 11 July to 2 August 1996, now pronounces the following judgement:

I. The Applicant, a Polish national, entered the service of the United Nations Office at Geneva on 1 July 1949. In April 1953, he was recruited as an assistant statistician in the Permanent Central Opium Board of the Drug Supervisory Body, the predecessor of the International Narcotics Control Board (INCB), of which he became Deputy Secretary in December 1967 and, subsequently, Secretary on 1 February 1977. He retired on 31 August 1978.

II. The Applicant complains of two decisions: first, the decision not to promote him to the post of Director (D-1), against which he lodged an appeal with the Joint Appeals Board

(JAB) on 16 March 1978 and, secondly, the decision not to extend his service beyond the mandatory age of retirement. He likewise filed an appeal against the latter decision on 31 August 1978.

III. Seized of these two appeals, the JAB considered that the Applicant's career would have followed its normal course until, and probably beyond, mandatory retirement age if it had not been intentionally ruined by resentment and a spirit of vengeance, in a climate of gross incompetence on the part of the Administration. In the opinion of the JAB, these facts, together with the irregularities in the treatment of the Applicant, caused the Applicant both material and moral injuries for which he should receive fair compensation. The Board recommended that the Secretary-General send the Applicant a letter of apology, acknowledging the damage caused to such an outstanding career, and to pay him, as damages, a sum not less than US$ 25,000. When the Secretary-General rejected these recommendations, the Applicant appealed to the Tribunal.

IV. The Applicant requests, first of all, the Tribunal to order the production of extracts from the minutes of the Appointment and Promotion Board which three times - in 1976, 1977 and 1978 - had led to the Secretary-General's non-inclusion of his name in the D-1 Promotion Register. He considers, moreover, with respect to the merits, that, having been the victim of an injustice from 1977 to 1979, he was entitled to compensation as recommended by the JAB. In conclusion, he adds that he was entitled to an SPA when he became acting Secretary of INCB.

V. With regard to the request to obtain the production of evidence, the Respondent cites the difficulty of gaining access to the 20-year-old archives, which have been transferred from Geneva to Vienna; he adds, however, that he is prepared to make the necessary efforts to obtain them.

With regard to the SPA requested by the Applicant, the Respondent considers that the Applicant is not entitled to it and that the granting of such an allowance is subject to the discretion of the Secretary-General. The Respondent maintains that the same holds true for the non-promotion of the Applicant. There is no evidence that that decision was influenced by extraneous circumstances or prejudice or that it was the result of discrimination.

With regard to the non-extension, the Respondent replies that this decision was taken in the exercise of the discretion accorded to the Secretary-General under the Staff Regulations in force at the time, and that the extension of a staff member's employment beyond retirement age is not a right but merely a possibility subject to the judgement of the Secretary-General.

The Respondent nevertheless notes that the unusual length of time it took to review the Applicant's case caused the Applicant damage and that the Tribunal could consider awarding him compensation in accordance with its decisions in cases No. 327, *Ridler* (1984), and No. 412, *Gross* (1988).

VI. The Tribunal, first of all, denounces the tense and confused climate of conflict, fraught with contradictions, surrounding the appointment of the Deputy Secretary of INCB. The Tribunal is convinced that this climate had an undeniable impact on the way in which the Applicant's candidature for promotion was reviewed, both under the regular and ad hoc promotion procedures.

The file reveals that the President of INCB had himself highly recommended and strongly supported the Applicant's candidature for promotion to the post of Secretary of the Board. The same was true when the Applicant was a candidate for promotion both as part of the normal promotion exercise and when it was a question of his ad hoc promotion. However, a change in the attitude of INCB occurred as a result of the very negative influence of a representative of a permanent mission of a Member State. It becomes clear from the file that the representative of that country had held great animosity towards the Applicant owing to the latter's refusal to yield to external pressure to appoint as Deputy Secretary of INCB a person

whose candidature was supported by this representative, while the Applicant, exercising his independence, preferred another candidate.

VII. The Tribunal sorely regrets that the Administration, which was aware of these machinations, which are incompatible with the requirements of Article 100 of the Charter regarding the independence of the staff, did absolutely nothing to put a stop to them. The Tribunal believes that the repetition of such an attitude on the part of the Secretary-General would discredit not only the Organization but would also seriously compromise its proper functioning.

VIII. The Tribunal now turns to a review of the parties' contentions.

With regard to the request for the production of extracts from the minutes of the Appointment and Promotion Board, the Tribunal considers that the documents at its disposal are sufficient to enable it to render a decision. This being the case, the request shall be rejected.

With regard to the non-promotion of the Applicant, the Tribunal considers, as the JAB correctly pointed out, that this decision was very greatly influenced by the extraneous considerations mentioned in paragraph VI above.

Moreover, like the JAB, the Tribunal notes that the Applicant's file as submitted to the Board contained irregularities. On the one hand, the periodic report for 1975-1977 was missing; on the other, the only signature on the periodic report for 1975-October 1977 belonged to a person who was not the Applicant's regular supervisor, as required by the Staff Rules.

The Tribunal further notes that the Applicant's case was considerably delayed, in fact excessively so; such delay is therefore unacceptable. It took eight years for the Applicant's case to be reviewed by the JAB, and seven years by the Administration. The JAB adopted its report on 14 August 1986. The Secretary-General took his decision on the report seven years

later, on 28 September 1993. Responsibility for the delay rests with the Administration; the latter must compensate for the consequences, in accordance with the constant practice of the Tribunal.

IX. With regard to the payment of an SPA, the Tribunal notes that, when the Applicant was still Deputy Secretary, he had in fact replaced the former Secretary of INCB from August 1976 to 31 January 1977.

Thus, under the provisions of staff rule 103.11 (b) in force at the time, and contrary to the Respondent's conclusions, the Applicant was, in the case in point, entitled to receive such an allowance since he had replaced the Secretary for more than six months to the great satisfaction of the members of INCB.

X. With regard to the non-extension of the Applicant's service beyond retirement age, the Tribunal considers, together with the Respondent, that the staff member had no right to make a claim based on the Staff Regulations and Rules; the Secretary-General has discretionary power in this area, unless it is established that his decision was influenced by considerations unrelated to the exigencies of the service, or that it had been taken as a result of prejudice or discrimination.

The Applicant, whose responsibility it was to adduce such evidence, did not do so. The Tribunal therefore rejects this request. It considers that, in this instance, the Secretary-General correctly exercised his discretionary power.

XI. For these reasons, the Tribunal:

1. Rejects the request for the production of new documents and the request concerning the non-extension of the Applicant's contract beyond the mandatory age of retirement;

2. Orders the Respondent to pay the Applicant retroactively the SPA to which he was entitled from August 1976 to 31 August 1978;

3. Orders the Respondent to pay the Applicant damages for all the injuries sustained, in particular as concerns his non-promotion to the D-1 level and as a consequence of the irregularities pointed out by the JAB, and as a result of the delay in reviewing his case, the lump sum of US$ 35,000.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 2 August 1996

R. Maria VICIEN-MILBURN
Executive Secretary